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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JOSEPHINE HANNER,
Petitioner,

v.

CECIL DEMARCUS,
Respondent.

No. 497

PETITIONER'S OPENING BRIEF

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COMES NOW the petitioner herein, Josephine Hanner, by and through her counsel, Philip M. Haggerty, of the State of Arizona, and a member of the bar of this Court, and respectfully petitions the Court to reverse the decision of the Supreme Court of the State of Arizona, entitled "Betty Jo Knight, et al, Appellants, vs. Cecil DeMarcus, Appellee," Cause No. 8228, and direct entry of judgment in favor of this petitioner, and against this respondent; pursuant to the writ of certiorari issued at and under the seal of this Court on August 15, 1967.

A. *DECISION SOUGHT TO BE REVIEWED*

The decision sought to be reviewed is entitled, "Betty Jo Knight et al v. Cecil DeMarcus," No. 8228, Supreme Court of Arizona. It is reported at 102 Ariz. ....., 425 P.2d 837. The text of the opinion is reproduced in the Appendix, p. 23.

B. *GROUNDS UPON WHICH REVIEW IS SOUGHT.*

1. The opinion of the Supreme Court of Arizona was rendered on March 29, 1967. (A. p. 23)

2. Petitioner's motion for rehearing was denied on May 23, 1967. (A. p. 50)

3. The jurisdiction of this Court is founded upon Article I of Amendment XIV, Constitution of the United States, §1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without a due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Jurisdiction is also founded upon the provisions of 28 U.S.C. 1257:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: ***(3) by writ of certiorari

. . . where any title, right, privilege or immunity is specially set up under the constitution . ... of . . . the United States."

C. *CONSTITUTIONAL AND STATUTORY PROVISIONS*

Constitution of the United States

Section 1, Amendment XIV, Constitution of the United States:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

Statutes

Arizona Revised Statutes

ARS 12-1281: "Property sold subject to redemption, or any part sold separately, may be redeemed by the following persons or their successors in interest:

"1. The judgment debtor or his successor in interest in the whole or any part of the property. . . ."

ARS 12-1282: "A. The judgment debtor or his successors in interest may redeem at any time within six months after the date of sale" . . .[1]

ARS 12-1552: "A. Executions are either general or special.

"1. A general execution is one which commands the officer to whom it is addressed to make the amount of the judgment out of property of the judgment debtor without specifying the particular property.

"2. A special execution is one which commands the officer to whom it is addressed to sell certain specific property, or to deliver certain real or personal property to the party adjudged to be entitled thereto:" . . .

ARS 12-1553: "A general execution shall state the amount of the judgment and costs and the amount due thereon, and shall require the officer:

"1 If the execution is against the property of the judgment

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[1] Since amended, laws Arizona 1963, Ch. 53 §1, to provide a 30-day redemption period for abandoned and non-agricultural property.

debtor, to satisfy the judgment, with interest, out of the personal property of the debtor, and if sufficient personal property cannot be found, then out of his real property.". . .

ARS 12-1562:

"A. An officer shall execute a general execution against the property of a judgment debtor by levying on a sufficient amount of property, if there is a sufficient amount of such property, and collecting or selling the things in action and selling the other property and paying to the judgment creditor or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and costs shall be returned to the judgment debtor unless otherwise directed by an order of the court.

"B. A judgment debtor may point out to the levying officer the property he desires to be levied on, and if the officer deems it sufficient to satisfy the execution, he shall make levy on no other property." . . .

ARS 12-1559: "The officer to whom the writ is directed shall make the levy as follows:

1. To levy on real estate it is sufficient that the officer endorse the levy on the writ of execution and file with the county recorder of the county where the real property is situated a copy of the writ with the endorsement of levy thereon.

2. To levy on personal property the officer shall take possession when the defendant in execution is entitled to the possession. ***"

ARS 12-1621: "A. Notice of sale under execution shall be made as follows: . . .

3. For the sale of real property, notice shall be given by posting notices for not less than fifteen days successively before the day of sale in three public places in the county, one of which shall be at or near the court house door, and publishing a copy thereof in a newspaper for three weeks before the day of sale."

Rules of Procedure

Rule 53, Arizona Rules of Civil Procedure

Federal Rules of Civil Procedure:

"53(a) Appointment and compensation . . . . As used in these Rules, the word 'master' includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such other parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation, but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

D. *QUESTIONS PRESENTED FOR REVIEW*

I

Is it a violation of the provisions of Section 1, Amendment XIV to the Constitution of the United States for a state court to approve and enforce a procedure by which an officer of the court, to-wit, a special master appointed by the court, may execute upon the property of a party appearing before him and purchase said property at execution sale without actual notice to the party-property owner of either intention to execute, execution, or sale?

II

Is it a violation of the provisions of Section 1, Amendment XIV to the Constitution of the United States to approve and enforce a law by which such an officer of the court and special master may retain the benefit of ownership of such property by an execution sale, where the evidence of the real value of that property, which evidence was obtained by said special master in the performance of his official duties, shows the property to be worth between four and eight times the amount awarded said special master as his compensation?

III

Where a judgment creditor who is an officer of the court is aware of personal property sufficient in value to satisfy his judgment against a party, and he fails to inform the levying officer of such property and directs specific execution against a certain piece of real property; and the levying officer makes no attempt to locate personal property or to inquire of the debtor which real property should be levied on, all in violation of the clear terms of the statutes relating to executions, is not such a violation of the statutes by two officers of the court, without notice to the debtor, a

violation of the traditional notions of due process and fair play, in contravention of Article 1 of Amendment XIV, Constitution of the United States?

E. *STATEMENT OF THE FACTS*

This case originated as a quiet title action involving certain land located in Maricopa County, Arizona. The land had been owned by petitioner Josephine Hanner, and the action was brought against her by Cecil DeMarcus, respondent herein, against her, her daughter, Betty Jo Knight, and two other persons apparently claiming lien interests in the land. (A. p. 5) Although the complaint does not so state, subsequent pleadings disclosed the basis for Mr. DeMarcus' claim of title.

Cecil DeMarcus is and was a certified public accountant who had been appointed by the Superior Court of Maricopa County, Arizona, as a special master in Cause No. 49044, entitled, "Arthur E. Hanner v. Josephine Hanner". (R. of Master, Exh. A)

This cause was a divorce proceeding, and DeMarcus was appointed pursuant to Rule 53, Arizona Rules of Civil Procedure, to assist in the untangling of the complicated property situation of the Hanners. As special master, he was awarded the sum of $5,572.10, which sum was ordered to be paid by Josephine Hanner as part of the judgment and decree of divorce entered June 21, 1959. (A. p. 2)

This decision was taken by appeal to the Supreme Court of Arizona and was decided by that court on January 15, 1964. *Hanner v. Hanner,* 95 Ariz. 191, 388 P.2d 239.

The amount of the fee was not disputed, solely its apportionment entirely to Mrs. Hanner. (See dissenting opinion, Jennings, J.)

As we noted in our petition for certiorari, we took no issue with this decision, but note it merely to point out that all of the acts of DeMarcus relative to the property took place while this appeal was pending.

After the entry of judgment and on September 18, 1959, a writ of general execution was issued out and under the seal of the

Superior Court of Maricopa County in Cause No. 49044, directed to the sheriff of Maricopa County and commanding him to execute in statutory language upon the personal property of Josephine Hanner, or if none could be found, upon her real property, in sufficient amount to pay the judgment amount of $5,703.10 to DeMarcus.[2]

Pursuant to this writ, the property in question was sold at execution sale and a sheriff's deed issued to "Harold" DeMarcus: (A. p. 2)[3]

The sale took place on October 29, 1959, and the deed issued on March 27, 1962. (A. p. 9) Apparently, the provisions of ARS 12-1621, pertaining to the posting of notice and the advertisement by publication, were followed.

Josephine Hanner took the position and stated from the beginning of the quiet title action that no notice of this execution or sale was given to her. See her verified answer (A. p. 7) The answer also prayed the execution be set aside as void. (A. p. 9) Following the answer, DeMarcus moved for summary judgment, alleging compliance with the notice statutes. (A. p. 11)

Mrs. Hanner replied again under oath by affidavit attached to her response to motion for summary judgment, stating she was never aware of any proceeding against the property, either by information provided by DeMarcus or the sheriff, and also alleging payment of taxes on the property during the time at which it was alleged that an execution had been run. (A. p. 17)

The motion also stated that her then attorney, John Levy, was in constant contact with DeMarcus, practicing on the same floor of the same small office building, and that at no time during their

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[2] The parties herein have not been able to locate a copy of this writ for inclusion in the Appendix; the sole copy extant being the original filed as part of the record herein. The execution apparently includes additional costs.

[3] This is apparently a typographical error, as all of the actions brought herein related to Cecil DeMarcus.

many conversations was the subject of a possible execution mentioned.

Summary judgment was, however, entered against the petitioner herein in November of 1963. (A. p. 19)

A motion for new trial was filed thereafter by the petitioner herein, again raising the question of notice and due process. (A. p. 20)

Appeal to the Supreme Court of the State of Arizona followed, in which the same argument was among those alleged, but was not accepted by the court in its opinion. (A. p. 23)

Following the opinion of the Supreme Court of Arizona, an extensive motion for rehearing was filed in that court, in which verified statements again were presented to the court to the effect that Josephine Hanner had no notice of any execution or sale, that she had personal property in excess of the judgment against her, that no attempt was made to levy upon this property, and that the fact that she had such personal property was known to Cecil DeMarcus. (A. pp. 44, 45)

The frequent meetings between her counsel and Cecil DeMarcus were again pointed out and statements of DeMarcus taken on deposition introduced, in which he stated that he deliberately avoided mentioning to her attorney the fact that he was seeking execution to collect his fee. The motion for rehearing also pointed out that she had been paying the taxes on the property during the interim, and that therefore she was the record owner of the property with her address known and available during the entire period. It was also pointed out that she has been living at the same address in Phoenix for a considerable period of time, and was readily available by either telephone or mail contact. (A. pp. 33, 44, 45) The motion for rehearing was denied.

The value of the property seized under execution sale was set and determined by DeMarcus as part of the divorce proceedings to be of the value of approximately $20,000. (R. master's report, Exh. A, p. A3) Mrs. Hanner herself set the value of the property at approximately $40,000. (A. p. 45)

F. *SUMMARY OF ARGUMENT*

The petitioner urges that it is error and a violation of due process to permit an execution and sale of real property where the laws of execution state that personal property must first be seized, and no effort was made to seize or levy on such property despite actual knowledge by the judgment creditor that personal property was available for seizure.

It is also urged that, where a statute allows a judgment debtor to point out real property to the sheriff to be levied upon, a denial of this opportunity to the judgment debtor is a denial of notice required by the statute, and a denial of due process.

The petitioner urges that, where the statutes taken together require an actual contact between the levying officer and the debtor to fulfill all legal requirements or to afford an opportunity for the exercise of all rights granted by law to the debtor, and where such statutes are not strictly followed, the notice required by law has therefore not been given, and process has not been followed. Since failure to follow process of law in a substantial area such as notice has resulted in substantial loss; the property of the petitioner herein has, in fact, been taken without due process in violation of our constitutional provisions.

The petitioner further urges that, even if this court does not hold that actual notice is a requirement in all cases of execution sale, in this instance the respondent, as special master and officer of the court, may not use his special knowledge of the property of parties to the hearing before him to make a substantial personal profit far beyond his awarded fee. The actual proceedings herein whereby the respondent did precisely that are an affront to traditional notions of fair play and substantial justice.

The petitioner also urges that the remedies of a special master to not allow him to seize the property of a party appearing before him, without notice, allow him only to cite that party for contempt, such citation necessarily requiring actual notice. This notice was not here provided, and the failure to so provide it again violates our traditional notions of due process.

G. *ARGUMENT*

A Party With Actual Knowledge of Personal Property Subject To Execution Must Execute On This Property First.

As the statutes of Arizona provide, ARS 12-1553 (p. 3, *supra*), a general execution must be satisfied first out of the personal property of the debtor. Herein the record is clear that the judgment creditor, Cecil DeMarcus, as special master and by virtue of that position, had actual knowledge of the existence of personal property belonging to the judgment debtor, petitioner herein, of a value in excess of that of the judgment. (R. Report of Master, Exh. A; p. A. 3)

The list of personal property available is quite extensive. In addition, in her affidavit, Mrs. Hanner stated that she had owned an automobile. (A. p. 47) Ownership of an automobile is a matter of record in Arizona, as in most states, and can be easily obtained. Perhaps in general circumstances, one might not say that the sheriff is bound to look high and low across the breadth of his county for personal property, but we believe that an equity master may not retain and conceal from the sheriff actual knowledge of personal property available to satisfy his judgment, in order to levy on a specific piece of real property.

By this we do not mean to necessarily imply that the sheriff is without duty in the premises. Since a simple inquiry of the judgment debtor herself could have revealed the information to the sheriff, we believe it is not asking too much to state that this is a requirement. In fact, this duty of the sheriff was specifically enjoined by him by an earlier and, we believe, wiser Arizona Supreme Court in *Blasingame v. Wallace,* 32 Ariz. 582, 61 Pac. 42, where it held as follows:

> "But when there is no one concerned other than the parties to the judgment, the execution, and the sale, and the motion to vacate is made within a reasonable time, the sale may be set aside where it is shown that the judgment debtor had sufficient personal property which could have been applied on the judgment, and that the officer knew it, or by the exercise of reasonable diligence could have discovered it, and failed to levy upon it, but

instead levied upon and sold for the amount of the judgment real property worth many times said sum." Blasingame v. Wallace, 32, Ariz. 582, 61 Pac. 42 (1927) at 32 Ariz. 586.

The essential point remains, however, that an officer of the court, with actual knowledge of personal property, did not attempt to execute on it when he knew it was readily available.

The Failure To Provide The Opportunity To Point Out Real Property Cut Off Substantial Rights Of The Petitioner.

This Court in *Griffin v. Griffin,* 327 U.S. 220, had the following to say:

> "It is plain in any case that a judgment in personam by directing execution to issue against petitioner, and thus purporting to cut off all available defenses, could not be rendered on any theory of the state's power over him, without some form of notice by personal or substituted service. [citations omitted] Such notice cannot be dispensed with, even in the case of judgments in rem with respect to property within the jurisdiction of the court rendering the judgment." 327 U.S. at 228.

In the specific case decided by the court, the petitioner had been involved in a divorce proceedings. Supplemental proceedings were held in New York, resulting in a judgment against him, for past due alimony in 1935. He had notice of these proceedings. His wife ex parte in 1938 obtained an addition to this amount for arrearages accruing between 1936 and 1938. These proceedings were without notice to the husband. Thereafter, execution was sought for the whole amount. We recognize, of course, that the petitioner herein had notice of the original judgment against her, and that there was no question of subsequent proceedings resulting in a higher amount, as in the *Griffin* case, but we believe the case does stand for the principal that subsequent proceedings without notice which result in the cutting off of defenses can result in a holding that the proceedings have violated due process. While here Mrs. Hanner had no subsequent "defenses" cut off, she did have certain rights cut off by the failure of notice. Specifically, she had the right to point out to the sheriff other property which she might have desired be levied upon, (A.R.S. 12-1562) or even in the instant case individual lots, rather than the four which were

seized by the sheriff. Even if she had no other property or did not wish her property to be seized, she might readily have argued to the sheriff that the seizure of one of the four lots involved would be of sufficient value to satisfy the judgment. In fact, however, under the procedure used herein and through a neglect of the sheriff to follow the applicable statute, DeMarcus could have levied and executed upon real property owned by the petitioner in 20 to 100 times the amount of his judgment, had she owned that much property.

The provisions of the statute on execution allowing a debtor to point out his property, combined with the statute providing that personal property must be seized first, prior to any levy on real property, are a substantial protection to the judgment debtor required by the laws of the State of Arizona and supported in *Blasingame v. Wallace, supra.* They are not only substantial but, in fact, the sole protection to the judgment debtors in the area of notice, and a failure to follow them is a denial of notice required by the statutes and a violation of due process.

The Total Statutory Scheme in Arizona of Levy, Execution and Sale Requires Actual Notice Not Provided Herein.

Obviously, states may provide various methods of plans by which property is levied upon, executed and sold to satisfy judgments. It is also conceivably possible that a statutory scheme could be worked out whereby no further notice to a judgment debtor were ever required, and due process not violated. However, we are not concerned with that possibility herein, because we believe that the statutory scheme of Arizona requires actual notice and that, therefore, the failure to follow it is a failure to afford her the process provided by the laws of the state and upon which all of its citizens have a right to rely. Such a failure where substantial damage is done is a violation of due process.

A levy or writ of execution upon real property is accomplished simply by endorsing the levy or writ and filing it with the county recorder of the local county. ARS 12-1559 (*supra,* p. 4). Obviously, this requires no notice to the party, contrasted with the next

paragraph which requires actual reduction to possession of personal property levied upon. Further, the provisions relating to sale require posting in three places, one of them at or near the courthouse, and advertisement in a newspaper. ARS 12-1621 (*supra*, p. 4).

This Court has often re-enunciated the principle first clearly set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, to the effect that "notice must be such as is reasonably calculated to reach interested parties." The concept that notice is achieved by posting or by publication was chipped away at in this case and in *Walker v. City of Hutchinson*, 352 U.S. 112, and finally, properly laid to eternal rest in *Schroeder v. City of New York*, 371 U.S. 208.

Where then does the requirement of notice arise? We believe it arises from the statutory requirement that a debtor be allowed to point out to the sheriff the property he desires to be levied upon. We can think of no statutory language which would more clearly indicate the fact that the sheriff and the judgment debtor have to come face to face to discuss the execution which the sheriff holds in his hand. We can well imagine how a legislature, after enacting such a statute, would go home well satisfied in the belief that no real property could be seized by a sheriff without the judgment debtor's being aware of the levy and execution.

The importance of notice as being a substantial matter for the judgment debtor specifically goes to the matter of redemption. As pointed out by our redemption law, ARS 12-1281-82, (*supra*, p. 3), a judgment debtor in the position of Mrs. Hanner in 1962 could have redeemed the property within six months from the date of the sale. The sale, as noted herein, took place on October 29, 1959 (A. p. 3).

The Supreme Court of Arizona pointed out this redemption provision, but failed to answer the question which first occurs: if you don't know the property has been sold, what would inspire you to redeem it?

This is particularly true in view of the fact that Mrs. Hanner was

still receiving tax bills after the property had been sold (A. pp. 18, 45), and would receive such bills in the normal course of events until the sheriff's deed was recorded in 1962.

The treatment rendered this by the Supreme Court of Arizona was as "cursory" as its admitted treatment of the subject of notice. In support of its position that "notice of the intended execution is immaterial and does not stand in the way of a summary judgment" (A. p. 26), the Supreme Court of Arizona cited *Maloy v. Taylor*, 86 Ariz. 356, 346 P.2d 1086. This case deals with the dismissal of a personal injury action turning upon certain phases of the New Mexico "guest statute", and contains as matter applicable to the instant case only the holding that, where there are no material issues of fact as a result of depositions or affidavits, a summary judgment may be granted. There is absolutely no mention in the case whatsoever of notice of execution or even the word "execution". There could not be, since no judgment was ever rendered in the court below or treated in the Supreme Court.

The Use of Specialized Knowledge By the Master to Effectuate Gross Personal Profit Is a Violation of Due Process.

A master at equity occupies a traditional position of long standing in courts of equity. The federal court system, as well as many states systems, has continued the use of masters in many proceedings. While a special master may not be said to sit upon a woolsack, he certainly acts under the aegis of the chancellor. As this Court has previously held:

> "He occupies a position of honor, responsibility and trust; the court looks to him to execute its decrees thoroughly, accurately, impartially, and in full response to the confidence extended; . . . The rights of those who ultimately pay must be carefully protected." *Newton* v. *Consolidated Gas Company of New York*, 259 U.S. 101.

Sell also *In re Gilbert*, 276, U.S. 6, to the effect that he has "the duties and obligations of a judicial officer".

And in the lower federal courts, we find that "he should be a person fit to perform the duties incumbent upon one sitting in

place of the court". *Finance Committee v. Warren,* 82 Fed. 525 (7th Cir. 1897).

See also *Universal Oil Products v. Hall,* 76 F.2d 258 (8th Cir. 1935), cert. denied 296 U.S. 621, to the effect that

> "A Master is a public servant engaged in a public function. He is an aide to the court of his appointment. He is not a servant of the litigants or a servant of their attorneys."

We find these dictates a little difficult to coincide with the activities of DeMarcus in this particular matter. His own report filed in the divorce action is, as we pointed out, a detailed analysis of the property owned by Mrs. Hanner primarily, and by her husband. The deposition of DeMarcus taken in the quiet title action and quoted in part in the motion for rehearing (A. p. 33) shows he communicated with Mrs. Hanner and her attorney both before and after the judgment, and that he did not mention the execution because, "Oh, I don't want to get into any arguments over anything as to whether I should or should not do it".

His own report (R. Report of Special Master, Exh. A) sets the value of the property in question at $20,000. There can be no doubt of the fact that DeMarcus could have easily informed Mrs. Hanner of the steps he was taking. He knew her attorney, her address, all the property she owned, in fact, far more than would be normal for an ordinary judgment creditor.

All of this information was obtained by him in the course of his official duties as a special master. These duties involved a detailed analysis of all the books and records kept by Mrs. Hanner concerning interest in a number of pieces of property with a further analysis of the encumbrances which might be on each of them. While we do not doubt the fairness of his fee in the amount of $5,000, our conscience is shocked by the fact that he turned this $5,000 judgment into a piece of property worth at least $20,000.[4]

This court in *Newton v. Consolidated Gas Co. of NY, supra,* not only held that "the rights of those who ultimately pay must be

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[4] The testimony of Mrs. Hanner to the effect that the property is worth $40,000 has, in fact, never been rebutted or denied.

carefully protected", but also that "his compensation should be liberal, but not exorbitant."

We fail to understand how the Supreme Court of Arizona can hold that $15,000 over and above the award of the court constitutes careful protection of the rights of the parties appearing before this special master. It is so gross as to shock the conscience of any court.

Such an underhanded use of his official knowledge and position by a special master is, fortunately, not common, as we have few cases on the subject. In *Universal Oil Products Co. v. Hall,* 76 F.2d 258 (8th Cir. 1935), cert. denied 296 U.S. 621, we do have a case in which one of the acts of the special master properly condemned was the fact that this master, in a patent proceedings of a complicated nature involving oil cracking, filed in his own name an application for a patent in the same field, obviously using the information learned by him in the course of the litigation. We have much the same parallel here.

DeMarcus used his information of the value of the property and directed the sheriff to seize four lots which he knew were of the minimum value of $20,000. Since his fee was slightly in excess of $5,000, one or perhaps at the most two of these lots would have satisfied the judgment.

He ignored the existence of personal property in an amount which would also have satisfied the judgment. He used his knowledge, authority and position to effectuate a substantial personal gain for himself. Such activity on the part of an officer of the court damages the entire judicial system and destroys the respect and trust of litigants and their reliance that disputes will be fairly heard and judged. This reliance, trust and belief so well earned by so many courts is the true authority of all courts, and damage inflicted to one injures all.

An Equity Master May Not Execute on the Property of Persons Appearing Before Him Without Notice.

Petitioner also urges herein that the remedy of execution by a special master on property of a party appearing before him is not,

in fact, authorized by statute, case law, or traditional equitable principles, and therefore the allowance of such an execution in this case is without due process of law where no notice has been provided.

The law in Arizona relating to the right of a special master to collect a fee awarded him is set forth in Rule 53(a), Arizona Rules of Civil Procedure, (*supra*, p. 5) which is, in effect, the same as Rule 53(a) of the Federal Rules of Civil Procedure. The rule specifically states that a special master may have "execution against the delinquent *party*". (emphasis added) Nothing is mentioned about an execution against the *property* of a party. The use of the word "party" would imply notice to the person, as one may not execute against a person without having him actually brought before the court.

The present Rule 53 is an adoption in part from Equity Rule 68. That rule read, insofar as is pertinent, to the effect that a special master may have "attachment for the amount against the party". It has been held that

> "It seemed best to the committee to make no startling changes in the existing practice, (as to reference) so the subject is covered by a single rule which merely attempts to clear up some of the most important obscurities that now exist." 28 Va. L.Rev. 261.

The one explanation of this rule which is found in our body of federal jurisprudence appears to be *Cutting v. Van Fleet*, 252 Fed. 100 (9th Cir. 1900). There the court held that the remedy was by contempt proceedings and that an order to show cause need not be issued before the party be found in contempt. In explaining the nature of the rule, the court held as follows:

> "The answer to the appellant's contention is that the order here made is not for the benefit of a party to the suit, and is not of the character of a judgment or decree for the payment of money, or a debt found due to the master. The proceeding is in contempt for refusal to obey an order of the court. The obligation to pay does not arise out of contract. It rests solely upon the order of the court. It operates upon the appellant in personam. Samel v. Dodd, 142 Fed. 68, 73 C.C.A. 254; Meeks v.

State, 80 Ark. 579, 98 S.W. 378; Wightman v. Wightman, 45 Ill. 167; Carlton v. Carlton, 44 Ga. 215. Rule 68 has taken away the rights of the master to hold his report until payment of his compensation and has given him in lieu thereof the right to the remedy of attachment."

The court then went on to hold that this did not constitute imprisonment for debt, as contempt of court was never held to be deprivation of this constitutional protection.

Thus, the only change we have in the old equity rules and the present rule is a substitution of the word "execution" for "attachment". The effect of the phrase is still that either remedy is directed against the "party", not against any property of the party involved.

Proceedings in contempt, like all equity proceedings, are in personam, and may not be enforced without actually bringing the delinquent party before the court inorder to impose punishment for contempt. *Holt v. Virginia,* 381 U.S. 131; *In re Oliver,* 333 U.S. 257.

Since the advisory committee apparently intended no drastic changes or substantial alterations of the old equity rules, but merely to correlate them into a better legislative pattern, we believe we can assume that the present rule is merely an extension of the old equity rule and that the remedy of a master who was not paid is to cite the party for contempt of court and execute upon his person.

If the promulgators of the federal rules wished to imply that the remedy was to be taken against the property of the debtor, it would have been a matter of the greatest simplicity to place the word "property" in the statute. But they permitted the phrase to remain "against the delinquent party".

The only conclusion which can be reasonably drawn is that those who recommended the rules and those who adopted them wished to continue the remedy to be a personal remedy against the delinquent party individually. Equity has always traditionally acted in personam, and this would be totally in accord with normal equitable practice.

The importance of this distinction herein lies in the fact that an action directed against a party for contempt would provide him with actual notice of the proceedings against him. Here there was no such actual notice, as we have pointed out, only the posting of notices or legal advertisement does not constitute any actual notice. Here we have an obligation of the special master, which obligation "the mailing of a single letter would have discharged", *Schroeder v. City of New York*, 9 L.Ed.2d 255.

The special master herein deliberately avoided the discharging of this obligation by even the mailing of a simple letter to Mrs. Hanner. He ignored the holding of the only federal court to consider the matter, *Cutting v. Van Fleet, supra*, and completely flouted the requirements of his position of "honor, responsibility and trust".

CONCLUSION

It is respectfully submitted that the proceedings herein conducted by respondent DeMarcus show that rules of procedure were ignored, statute was ignored, and that he used his special knowledge obtained by him acting as an arm of the court to acquire valuable property far in excess of his awarded fees. His conduct shows not only an absence of equity, but a deliberate, calculated, and awesomely successful effort to deprive the petitioner of her rights and her property and is an affront to the traditional notions of due process and substantial fair play heretofore so admirably protected by this Court.

Your petitioner prays that this Court reverse the decision of the Supreme Court of the State of Arizona and directs that it issue its mandate to the Superior Court of the State of Arizona in and for the County of Maricopa directing said court to set aside the levy, execution and sale of the real property involved in Cause No. 49004, as prayed for by the answer of the defendant, Josephine Hanner, therein.

Respectfully submitted,

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